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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Appln. of: Ligia A. Rivera et al.

Appln. No.: 10/771,969

Filed: February 4, 2004

For: Roll of Wet Wipes

Attorney Docket No: 659/2240 (K-C No. 14676.18)

Examiner: Alexander S. Thomas

Art Unit: 1772

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Respectfully submitted,

Peter Brunovskis
Peter Brunovskis (Reg. No. 52,441)

March 14, 2006

Date

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Date of Deposit

Peter Brunovskis, Reg. No. 52,441

Name of applicant, assignee or
Registered Representative

Peter Brunovskis

Signature

March 14, 2006

Date of Signature

Case No. 659/2240 (K-C 14676.18)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Ligia A. Rivera et al.)

Serial No.: 10/771,969)

Filing Date: February 4, 2004)

For: ROLL OF WET WIPES)

Examiner: Alexander S. Thomas

Group Art Unit No.: 1772

APPEAL BRIEF

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This Appeal is in response to the Advisory Action dated November 7, 2005 and the Final Office Action dated August 25, 2005.¹

¹ On December 14, 2005, Appellants filed a Notice of Appeal, thereby setting February 14, 2006 date for filing an appeal brief. Since the Notice of Panel Decision from Pre-Appeal Brief Review was mailed on February 16, 2006, the time period for filing an appeal brief was reset to March 16, 2006. Accordingly, the present appeal brief is timely filed.

I. REAL PARTY IN INTEREST

The present application is owned by Kimberly-Clark Worldwide, Inc.

II. RELATED APPEALS AND INTERFERENCES

The undersigned, Peter Brunovskis, is not aware of any other appeals, interferences, or other judicial proceedings that may be related to, would directly affect or be directly affected by or have a bearing on the Board's decision in the pending Appeal.

III. STATUS OF CLAIMS

The status of the claims is as follows:

Claims 81-87, 111-114, 119 and 120 are finally rejected under 35 U.S.C. § 103(a) for being obvious over applicants' acknowledged state of the art in view of U.S. Patent No. 5,763,332 (Gordon et al.).

Claims 90-98, 115-118, 121 and 122 are finally rejected under 35 U.S.C. § 103(a) for being obvious over applicants' acknowledged state of the art in view of U.S. Patent No. 5,763,332 (Gordon et al.) as applied to claims 81-87, 111-114, 119 and 120 above, and further in view of U.S. Patent No. 6,623,834 (Nissing et al).

Claims 81-87, 111-114, 119 and 120 are provisionally rejected under obviousness-type double patenting as being unpatentable over claim 41 of copending Application No. 10/664,342.

Claims 90-98, 115-118, 121 and 122 are provisionally rejected under obviousness-type double patenting as being unpatentable over claim 41 of copending Application No. 10/664,342 in view of U.S. Patent No. 6,623,834 (Nissing et al).

Claims 88, 89, 99 and 100 have been objected to, but would be allowed if rewritten in independent form including all of the limitations of the base claim.

Claims 1-80 and 101-110 have been cancelled.

The above-mentioned rejections of claims 81-87, 90-98 and 111-122 are the subject of this Appeal.

IV. STATUS OF AMENDMENTS

A Final Rejection was mailed August 25, 2005; an After-Final Amendment was filed October 25, 2005. The Advisory Action mailed November 7, 2005 indicated that the claim amendments would be entered for purposes of appeal.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The claimed subject matter relates to a roll of wet wipes comprising a wetting composition comprising at least about 1 weight percent of inorganic salt. Rejected claims 81-87, 111-114, 119 and 120 further define the roll and/or wet wipes according to specific physical characteristics, dimensions or wetting compositions. Rejected claims 90-98, 115-118, 121 and 122 further define the roll as having a groove, whereby the roll is further defined by specific physical characteristics or wetting compositions.

An understanding of the invention of independent claims 81 and 92 can be made upon a review of the embodiments of the invention. In a first aspect, claim 81 recites a roll of wet wipes comprising at least 300 linear inches of wet wipes (p. 2, line 18; p. 14, lines 26-29), the wet wipes having a width of not more than 4.5 inches (p. 2, line 19); and a wetting composition comprising at least about 1 weight percent of inorganic salt, based on the weight of the wetting composition (p. 3, line 26; p. 35, line 7; p. 17, lines 17-21 and p. 41, lines 15-30 in U.S. Patent Application Serial No. 09/564,531, which was incorporated by reference in the August 3, 2005 response; and col. 38, lines 17-35, which was incorporated by reference in the October 24, 2004 response); wherein the wet wipes are in a spiral (p. 2, line 19; p. 25, line 18-19); and the diameter of the roll is at least about 2 inches and no greater than about 5.5 inches (p. 2, lines 21).

In a second aspect, claim 92 recites a roll of wet wipes, the wet wipes comprising a groove (p. 4, line 23); and a wetting composition comprising at least about 1 weight percent of inorganic salt, based on the weight of the wetting composition (p. 4, line 26; p. 38, lines 11-13; p. 17, lines 17-21 and p. 41, lines 15-30 in U.S. Patent Application Serial No. 09/564,531, which was incorporated by

reference in the August 3, 2005 response; and col. 38, lines 17-35, which was incorporated by reference in the October 24, 2004 response).

The purpose of the wetting composition is to provide sufficient in-use strength to a flushable, dispersible wet wipe so that it does not fall apart until after the point of use. Upon dilution with water, as occurs during flushing, the wipe falls apart, thereby enhancing its disposability and degradability and reducing the environmental concerns associated with landfill biodegradability (p. 41, lines 15-30 in U.S. Patent Application Serial No. 09/564,531, which was incorporated by reference in the August 3, 2005 response).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

There are four grounds of rejection presented for review:

- 1) the rejection of claims 81-87, 111-114, 119 and 120 for being obvious under 35 U.S.C. § 103(a) over applicants' acknowledged state of the art in view of Gordon;
- 2) the rejection of claims 90-98, 115-118, 121 and 122 for being obvious under 35 U.S.C. § 103(a) over applicants' acknowledged state of the art in view of Gordon, and further in view of Nissing;
- 3) the provisional rejection of claims 81-87, 111-114, 119 and 120 under obviousness-type double patenting over claim 41 of copending Application No. 10/664,342; and
- 4) the provisional rejection of claims 90-98, 115-118, 121 and 122 under obviousness-type double patenting over claim 41 of copending Application No. 10/664,342 in view of Nissing.

VII. ARGUMENT

A. Claims 81-87, 111-114, 119 and 120 are patentable over applicants' acknowledged state of the art in view of Gordon

1. Gordon does not provide a motivation to combine

Claims 81-87, 111-114, 119 and 120 were finally rejected in the Final Office Action of August 25, 2005 under 35 U.S.C. § 103(a) as being obvious over applicants' acknowledged state of the art in view of U.S. Patent No. 5,763,332 (Gordon et al.; hereinafter "Gordon"). According to the Final Office Action, Applicants' background discloses the invention substantially as claimed, namely a roll of wet wipes with perforated sheets; and Gordon discloses the desirability of using a sodium chloride containing composition on wet wipes. The Examiner argued that it would have been obvious to use the antibacterial composition of Gordon to provide a wet wipe with enhanced cleaning properties. Regarding the size of the roll, the Examiner stated that it would have been obvious to adjust the size of the wet wipes to accommodate a particular end use.

Gordon does not disclose a roll of *wet* wipes. In fact, Gordon teaches away from using wet wipes. Gordon's background section discusses prior art wipes kept in a dispenser soaked in a moistening solution having a permanent wet strength such that they are not flushable² and teaches that prior art wipes are often too wet to dry the skin and have a cold feel (see col. 2, lines 38-46). Accordingly, Gordon provides an alternative to wet wipes that confers selective wetting. Gordon's wipes are predicated on *not* being wet unless shear is applied to rupture an emulsion contained within the wipe, thereby releasing a wetting composition encapsulated within the emulsion. In other words, Gordon's wetting composition is encapsulated in an emulsion so as to be *shielded* from the wipes until the point of use. In contrast, Applicants' claims are directed to a roll of wet wipes fully exposed to a wetting composition and completely wet *before* use. Gordon fails to provide any motivation

² Applicants' invention is predicated on wetting a wipe with a wetting composition to maintain in-use wet strength, yet be flushable or dispersible when diluted in water.

for applying a wetting composition encapsulated within an emulsion to an already wet roll of wipes.

Not surprisingly, the Examiner does not suggest applying Gordon's emulsion to confer further wetness. Instead, the Examiner argues that Gordon discloses the desirability of a sodium chloride containing composition on wet wipes and that it would have been obvious to use the antibacterial composition of the secondary reference on the article to provide a wet wipe with enhanced cleaning properties. The Examiner does set forth the manner by which it would be obvious to apply the wetting composition (*i.e.*, by emulsion or otherwise). Regardless, Gordon does not disclose or suggest any antibacterial or cleaning benefit associated with the encapsulated wetting composition. Accordingly, the Examiner's rationale does not constitute a motivation to combine.

Gordon's goal was to provide to improve upon the emulsion-containing cleaning wipes described in an earlier copending application. In particular, Gordon's disclosure seeks to reduce the level of emulsion needed to counteract the level of water absorbed by hydrophilic carriers (col. 3, lines 14-31). Obviously, this is not a problem with a wet wipe saturated with a wetting composition both in and around the wipe. Gordon's basis for using sodium chloride in the emulsion is also not applicable to wipes saturated with a wetting composition. Sodium chloride is used in the internal polar phase of the emulsion as an electrolyte to minimize the tendency of materials present in the lipid phase to also dissolve in the water phase (col. 14, lines 8-15). The prior art would not have suggested any benefit in using sodium chloride in a wetting composition unless it were encapsulated within an emulsion.

Even if there was a substantiated motivation to incorporate additional, selectively releasing antibacterial wetting agents and/or cleaning agents to an already saturated wet roll, there is no reasonable expectation to expect the agents to be necessarily efficacious for their intended use after being diluted by the wetting solution in the saturated wet roll. In view of this and fact that Gordon explicitly teaches away from using wet wipes, if there was *any* motivation to combine at all, it would have been to convert a wet roll to a non-wet roll with wipes comprising an emulsion for selective wetting after it is removed from the roll prior the point of use.

However, this type of modification would not constitute a roll of wet wipes and would change the principle of operation and purpose of the prior art invention being modified, namely to provide a roll of wipes fully exposed to a wetting composition and completely wet *before* use.

In view of Gordon's failure to provide a benefit for using the disclosed wetting composition that could be reasonably applicable to wet rolls, Gordon cannot be reasonably combined except by inappropriate hindsight. In essence, to apply Gordon's wetting composition to a prior art wet roll, the skilled artisan would need to disassociate a wetting composition from an emulsion used for one benefit or purpose, and extrapolate from Gordon new benefits, *i.e.*, antibacterial and/or cleaning benefits not suggested or disclosed by Gordon, and apply the wetting composition to a wet roll. To jump through these hoops would not be obvious, however. Given the insufficient evidence and motivation to support a *prima facie* case of obviousness, the present claims cannot be obvious under 35 USC § 103 over Applicants' background and Gordon.

2. Missing claim elements

The Examiner has not provided Applicants with a reference or a combination of references which teaches or suggests all the elements depending from claim 81. Neither Applicants' background nor Gordon discloses or suggests a roll having at least 300 linear inches of wet wipes, the wet wipes having a width of not more than about 4.5 inches, wherein the diameter of the roll is at least about 2 inches and no greater than about 5.5 inches. Moreover, in spite of Applicants' submission of over three hundred documents in the form of Information Disclosure Statements, which have been reviewed by the Examiner, no references have been identified disclosing or suggesting these dimensions.

The Final Rejection states that it would have been obvious to adjust the size of the wet wipes to accommodate a particular end use of the wipe. However, the Office Action does not provide any particular end use described in a prior art reference that would necessitate or motivate a skilled artisan to modify a roll of wet wipes according to the present claims.

Inasmuch as the background teachings fail to supply the missing wet roll dimension elements, the missing claim elements appear to be derived from the Examiner's personal knowledge. To support such a rejection, the Examiner must set forth facts supported by an affidavit "when called for by the applicant". 37 CFR 1.104(d)(2). However, despite Applicants' challenge, no such affidavit has yet been provided.

3. Inappropriate reliance on Applicant's background as prior art

The Examiner's assertion that Applicants' background statements qualify as prior art is contrary to law. In the decision of *In re Dow Chemical Co.*, 5 USPQ2d 1529, 1531 (Fed. Cir. 1988), with reference to background description in a patent application, the Federal Circuit notes:

That there were other attempts, and various combinations and procedures tried in the past, **does not render obvious** the later successful one ... Further, a patent applicant's statement of the purpose of the work is **not prior art**. [Emphasis and ellipsis added]

B. Claims 90-98, 115-118, 121 and 122 are patentable over applicants' acknowledged state of the art in view of Gordon and Nissing

Claims 90-98, 115-118, 121 and 122 were finally rejected in the Final Office Action of August 25, 2005 under 35 U.S.C. § 103(a) as being obvious over applicants' acknowledged state of the art in view of U.S. Patent No. 5,763,332 (Gordon) and U.S. Patent No. 6,623,834 (Nissing et al.; hereinafter "Nissing"). According to the Examiner, Applicants' acknowledged state of the art discloses the invention substantially as claimed, namely a roll of wet wipes with perforated sheets; Gordon discloses the desirability of using a sodium chloride containing composition on wet wipes; and Nissing discloses the desirability of providing transverse grooves in wet wipe material to aid in cleaning surfaces.

All of the rejected claims require a wet roll comprising a wetting composition as claimed. Gordon does not teach or suggest, individually or in combination, the claimed wetting composition as applied to a wet roll for the above reasons.

Moreover, the Examiner's reliance on Applicants' background statements as prior art is contrary to law for the above reasons. Since Nissing fails to teach or suggest a wet roll comprising a wetting composition according to the present claims, Nissing fails to cure Gordon's deficiencies. Accordingly, Applicants respectfully request withdrawal of this rejection.

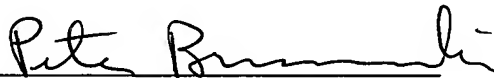
C. Provisional Obviousness-Type Double Patenting

Claims 81-87, 90-98 and 111-122 were rejected over claim 41 of copending Application No. 10/664,342 alone, or further in view of Nissing. MPEP 804 (I)(B) instructs the Examiner to maintain a "provisional" double patenting rejection as long as long there are conflicting claims in more than one application, but to withdraw the provisional double patenting rejection and allow the application to issue as a patent if it is the only rejection remaining. In that case, the "provisional" double patenting rejection should be converted into a double patenting rejection in the other application(s) at the time the one application issues as a patent. The November 7, 2005 Advisory Action indicated that the obviousness-type double patenting rejection was not withdrawn, because it was not the only rejection remaining. Provided that all of the above rejections are withdrawn, the "provisional" double patenting rejections of claims 81-87, 90-98 and 111-122 should be withdrawn.

VIII. Conclusion

The cited references, either alone or in combination with the Examiner's assertions, do not provide a valid basis for a *prima facie* obviousness rejection of the present claims. Accordingly, Appellants submit that the present invention is fully patentable over the prior art and the Examiner's rejection should be REVERSED.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Peter Brunovskis", is written over a horizontal line.

Peter Brunovskis
Registration No. 52,441
Agent for Appellants

BRINKS HOFER GILSON & LIONE
P.O. BOX 10395
CHICAGO, ILLINOIS 60610
(312) 321-4200

IX. CLAIMS APPENDIX

1.-80. (Canceled)

81. (Previously Presented): A roll of wet wipes, comprising:
a roll having at least 300 linear inches of wet wipes, the wet wipes having a width of not more than about 4.5 inches; and
a wetting composition comprising at least about 1 weight percent of inorganic salt, based on the weight of the wetting composition;
wherein the wet wipes are in a spiral; and
the diameter of the roll is at least about 2 inches and no greater than about 5.5 inches.

82. (Previously Presented): The roll of wet wipes of claim 81, comprising perforations.

83. (Previously Presented): The roll of wet wipes of claim 81, comprising perforated sheets.

84. (Previously Presented): The roll of wet wipes of claim 81, having at least about 90 perforated sheets.

85. (Previously Presented): The roll of wet wipes of claim 81, having a solid core.

86. (Previously Presented): The roll of wet wipes of claim 81, wherein the roll is coreless.

87. (Previously Presented): The roll of wet wipes of claim 81, having a hollow core.

88. (Previously Presented): The roll of wet wipes of claim 81, wherein the peel force between the wipes in the roll is at least 115 g.

89. (Previously Presented): The roll of wet wipes of claim 81, wherein the peel force between the wipes in the roll is from about 106g to about 170 g.
90. (Previously Presented): The roll of wet wipes of claim 81, comprising a groove in the roll positioned transverse to the axis of the roll.
91. (Previously Presented): The roll of wet wipes of claim 81, comprising a plurality of grooves.
92. (Previously Presented): A roll of wet wipes comprising:
a roll of wet wipes, the wet wipes comprising a groove; and
a wetting composition comprising at least about 1 weight percent of an inorganic salt, based on the weight of the wetting composition.
93. (Previously Presented): The roll of wet wipes of claim 92, comprising perforations.
94. (Previously Presented): The roll of wet wipes of claim 92, comprising perforated sheets.
95. (Previously Presented): The roll of wet wipes of claim 92, having at least about 90 perforated sheets.
96. (Previously Presented): The roll of wet wipes of claim 92, having a solid core.
97. (Previously Presented): The roll of wet wipes of claim 92, wherein the roll is coreless.
98. (Previously Presented): The roll of wet wipes of claim 92, having a hollow core.
99. (Previously Presented): The roll of wet wipes of claim 92, wherein the wet wipes have a peel force between the wipes in the roll of at least 115 g.

100. (Previously Presented): The roll of wet wipes of claim 92, wherein the wet wipes have a peel force between the wipes in the roll of between about 106g to about 170 g.

101.-110. (Canceled)

111. (Previously Presented): The roll of wet wipes of claim 81, wherein the wetting composition comprises between about 1 to about 10 weight percent or inorganic salt, based on the weight of the wetting composition.

112. (Previously Presented): The roll of wet wipes of claim 81, wherein the wetting composition comprises between about 1 to about 5 weight percent of inorganic salt, based on the weight of the wetting composition.

113. (Previously Presented): The roll of wet wipes of claim 81, wherein the wetting composition comprises from about 2 to about 4 weight percent of inorganic salt, based on the weight of the wetting composition.

114. (Previously Presented): The roll of wet wipes of claim 81, wherein the inorganic salt is sodium chloride.

115. (Previously Presented): The roll of wet wipes of claim 92, wherein the wetting composition comprises between about 1 to about 10 weight percent of inorganic salt, based on the weight of the wetting composition.

116. (Previously Presented): The roll of wet wipes of claim 92, wherein the wetting composition comprises between about 1 to about 5 weight percent of inorganic salt, based on the weight of the wetting composition.

117. (Previously Presented): The roll of wet wipes of claim 92, wherein the wetting composition comprises between about 2 to about 4 weight percent of inorganic salt, based on the weight of the wetting composition.

118. (Previously Presented): The roll of wet wipes of claim 92, wherein the inorganic salt is sodium chloride.

119. (Previously Presented): The roll of wet wipes of claim 81, wherein the inorganic salt comprises a monovalent ion.

120. (Previously Presented): The roll of wet wipes of claim 119, wherein the monovalent ion is selected from the group consisting of Na^+ , K^+ , Li^+ and NH_4^+ .

121. (Previously Presented): The roll of wet wipes of claim 92, wherein the inorganic salt comprises a monovalent ion.

122. (Previously Presented): The roll of wet wipes of claim 121, wherein the monovalent ion is selected from the group consisting of Na^+ , K^+ , Li^+ and NH_4^+ .

X. EVIDENCE APPENDIX

None.

XI. RELATED PROCEEDINGS APPENDIX

None.